

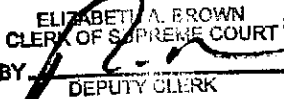
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAKE LEE,  
Appellant,  
vs.  
SOON YI LEE,  
Respondent.

No. 73746-COA

FILED

FEB 19 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Jake Lee appeals from a district court judgment awarding damages following a bench trial and order denying a motion to enforce his demand for a jury trial. Eighth Judicial District Court, Clark County; Linda Marie Bell, Chief Judge.

Jake and his wife Sun Hoi Lee own and manage the Honey Pig restaurant.<sup>1</sup> Respondent Soon Yi Lee worked at the Honey Pig from 2014 to 2018. In a telephone conversation between Soon Yi and Sun Hoi, Soon Yi claimed that Jake had sexually harassed her and carried on an extramarital affair with another Honey Pig employee.

Jake and Sun Hoi sued Soon Yi for defamation, defamation per se, negligence, intentional infliction of emotional distress (IIED), and fraud. In their complaint, they included a “demand that all issues in this case be tried by a jury.” Soon Yi filed a counterclaim against Jake for assault, battery, sexual harassment, and IIED.

In the parties’ joint case conference report, Jake and Sun Hoi checked a box indicating that they had not filed a demand for a jury trial. The district court thereafter issued an order setting a nonjury trial and,

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

nearly three months later, an order setting a bench trial. Shortly after the second order, Jake and Sun Hoi moved to enforce the demand for a jury trial in their complaint. The district court denied their motion, finding that the demand in their complaint did not comply with NRCP 38(b).

After a three-day bench trial, the district court issued an order finding for Jake on his defamation per se claim and awarding him \$1,000 in presumed damages. The court also found for Soon Yi on her assault, battery, and IIED claims, awarding her \$50,000 in compensatory damages. In a separate order awarding punitive damages, the court awarded Jake \$500 and Soon Yi \$25,000.

Jake appeals the district court's judgment, including the order denying his motion to enforce his demand for a jury trial.

#### *Excluded evidence*

Jake argues that the district court erred by excluding impeachment evidence he proffered during Soon Yi's testimony. Jake failed, however, to include the trial transcript in the appellate record, in written or video form. Without the transcript we cannot know why the district court excluded the evidence; in what form Jake proffered it; whether he authenticated the evidence; whether what he sought to prove with the evidence was collateral or central to the proceedings; or whether excluding the evidence affected his substantial rights. Because we must presume that the missing transcript supports the district court's ruling, we conclude that Jake fails to demonstrate that the district court abused its discretion by excluding the evidence. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

#### *Jake's jury demand*

Jake argues that the district court erred in denying his motion to enforce his jury demand. He also notes that the district court did not exercise its discretion under NRCP 39(b) to order a jury trial notwithstanding a party's failure to demand a jury trial under NRCP 38(b). He compares the facts here to those in *Walton v. Eighth Judicial District Court*, in which the court reasoned that "no delay or confusion would have resulted for the [district] court" and the respondent would not have been surprised or prejudiced had the district court exercised its discretion under NRCP 39(b) by ordering a jury trial. 94 Nev. 690, 695, 586 P.2d 309, 312 (1978). We disagree with both of Jake's arguments.

#### *NRCP 38*

This court reviews conclusions of law de novo. *Dewey v. Redevelopment Agency of Reno*, 119 Nev. 87, 93, 64 P.3d 1070, 1075 (2003). "When a rule is clear on its face, we will not look beyond the rule's plain language." *Morrow v. Eighth Judicial Dist. Court*, 129 Nev. 110, 113, 294 P.3d 411, 414 (2013). NRCP 38(b) provides that a party may demand a jury trial "by serving as required by Rule 5(b) upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than the time of the entry of the order first setting the case for trial." NRCP 3 provides that a civil action commences with the filing of a complaint. NRCP 38(d) provides that "[t]he failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury."

Here, the district court denied Jake's motion to enforce his demand, finding that the sentence in his complaint in which he demanded a jury trial failed to comply with NRCP 38(b). The court found that because Jake failed to serve a demand after commencement of the action and before

the first order setting the case for trial, he waived his right to a jury trial under NRCP 38(d). We conclude that the district court did not err in its interpretation of the plain language of NRCP 38.<sup>2</sup>

*NRCP 39(b)*

This court reviews a district court's refusal to order a jury trial under NRCP 39(b) for an abuse of discretion. *See Walton*, 94 Nev. at 695, 586 P.2d at 312. NRCP 39(b) provides that, "notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

Jake's reliance on *Walton* is misplaced. In *Walton*, the court held that ordering a jury trial under NRCP 39(b) would have caused no delay, confusion, or surprise because the district court had initially ordered a jury trial and the parties had initially agreed to set the matter for a jury trial. 94 Nev. at 695, 586 P.2d at 312. The facts here, however, are significantly different. Unlike in *Walton*, the district court ordered a bench trial. Unlike the opposing party in *Walton*, Soon Yi had little reason to believe that the district court would order a jury trial, and in fact had several reasons to believe the opposite. Therefore, ordering a discretionary jury trial under NRCP 39(b) in the case at bar could have caused delay, confusion, or surprise. Furthermore, Jake did not request that the district court exercise its discretion under NRCP 39(b). We thus conclude that the district court did not abuse its discretion by not ordering a jury trial under NRCP 39(b).


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<sup>2</sup>The Nevada Supreme Court has amended NRCP 38(b) effective on March 1, 2019. The new version tracks its federal counterpart, FRCP 38(b), and provides that a jury demand "may be included in a pleading."

Accordingly, we conclude that the district court committed no legal error nor abused its discretion, and we

ORDER the judgments of the district court AFFIRMED.<sup>3 4</sup>

  
\_\_\_\_\_, A.C.J.  
Douglas

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Linda Marie Bell, Chief Judge  
Kang & Associates PLLC  
Denton Lopez & Cho  
Eighth District Court Clerk

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<sup>3</sup>Jake also argued in his opening brief that Soon Yi's compensatory and punitive damages awards lacked the support of substantial evidence; the compensatory damages award was excessive; the district court erred in determining witness credibility; Soon Yi did not carry her burden of proof for her IIED claim; and Soon Yi failed to produce material evidence. Because he seemed to waive these contentions in a notice to the court shortly before oral argument, and confirmed the waiver at oral argument, we do not consider them.

<sup>4</sup>We note that Jake frequently referred to the record in his brief but only sparingly provided an actual citation. Moreover, his brief contained little relevant authority despite the number of issues he raised, and he failed to provide a trial transcript. We caution Jake's counsel that future failure to comply with NRAP 28(e)(1) briefing requirements may result in the imposition of sanctions. See NRAP 28(j) (providing that sanctions may be imposed for briefs that fail to comply with NRAP 28).